



SPRING 2022 NEWSLETTER

Many thanks to our clients, colleagues, and friends for their confidence, trust, and support over the last 15 years.

ANNOUNCEMENTS



K&S is pleased to welcome [Andrew Winston](#) to the Firm as an Associate Attorney. Andrew is a litigator who resolves business, construction, and insurance coverage disputes. An integral part of the Firm's trial team, Andrew has experience handling litigation matters relating to construction defect, insurance defense, personal injury as well as products, premises and professional liabilities.

[Chris Kenney](#) was appointed to the New England Legal Foundation's Massachusetts Advisory Council. NELF is a non-profit organization dedicated to addressing policy and constitutional concerns related to free enterprise. NELF's ongoing mission is to champion individual liberties, traditional property rights, properly limited government, and balanced economic growth. For more information, [read more here.](#)



Our K&S colleague Judy Murray was chosen for the [Massachusetts Lawyers Weekly](#) 2022 "Excellence in the Law" Award in Firm Administration and Operations. We were delighted to participate in the award celebration honoring her. To learn more about the award and Judy's outstanding accomplishments, [read more here.](#)

K&S is pleased to announce that [Emyr Remy](#) will attend the International Association of Defense Counsel's 48th

Annual Trial Academy at Stanford University this July. The IADC Trial Academy is one of the oldest and most respected programs for developing trial advocacy skills. This seven-day intensive program blends faculty instruction and demonstration with individual student participation. The faculty consists of leading defense trial lawyers selected on a national basis from different regions of the country. Each faculty member is assigned to a group of five to seven students which allows for individualized attention and instruction. Each student conducts opening statements, direct and cross examination of lay witnesses, direct and cross examination of medical doctors and economists, and closing arguments. These exercises are recorded, and the faculty member critiques them with the student. [Learn more here.](#)



CLIENT VICTORIES

[Mike Sams](#) and [Emyr Remy](#) successfully petitioned DCAMM to remove a reported failing score for a general contractor client following its completion of a public construction project. Arguing that the evaluation was deficient, untimely, and otherwise unreliable, the agency overturned its decision and removed the failing score from the client's unblemished record.



[Mike Sams](#) and [Alex Zwillinger](#) recently delivered a total victory for a residential contracting client. In 2017, the contractor completed a renovation at a property in Massachusetts without issue or complaint. Several years later, however, the homeowner claimed the contractor had performed defective work that caused water to infiltrate his basement, allegedly causing extensive property damage and personal injury. Mike and Alex first fought back when the client's insurer denied coverage under a complicated exclusion from the CGL policy, ultimately securing coverage including for the cost of defense. Then, they set about demonstrating that the contractor had done nothing wrong, proving the homeowner's claims were unfounded and its damages were overstated. After meticulous discovery and motion practice, the homeowner agreed to voluntarily dismiss the case without any money changing hands, allowing the contractor to move on and focus on new business. After Mike and Alex won the case, the client wrote, "I am completely blown away at the end results of this case. Thank you so much again from the bottom of my heart, you don't even know how grateful I am to have met you guys."

[Mike Sams](#) and [Alex Zwillinger](#) also recently delivered a favorable settlement for their Massachusetts construction client in a wrongful death case. One of the client's employees died instantly when he contacted high voltage power lines while painting windows from a boom lift. Mike and Alex avoided trial and settled the case for well below the plaintiffs' demand. In addition to negligence and personal injury, the case involved difficult issues concerning workers' compensation and OSHA.



[J. Nathan Cole](#) and [Alex Zwillinger](#) recently obtained partial summary judgment on behalf of a contractor client alleged to have violated a non-solicitation agreement. Nate and Alex successfully convinced the court that the agreement's liquidated damages provision was void against public policy and unenforceable because the

liquidated damages bore "no logical relationship to the profits [Plaintiff] would have lost due to the purported breach . . . Thus, the liquidated damages provision is unenforceable because it neither reasonably forecast nor was proportionate to actual damages."

Their victory was recently featured on the front page of Massachusetts Lawyers Weekly. The article focused on the strong effort by Nate during the deposition of the Plaintiff in which Nate obtained a key admission when the Plaintiff repeatedly admitted that the LDs provision was a "penalty." The court found this testimony critical in achieving the win, holding that the "[Plaintiff's testimony] could hardly be more damaging for [Plaintiff's] position. [Plaintiff] repeatedly described the liquidated damages clause as a penalty. While the testimony does not constitute a legal opinion or have binding effect upon the Court's determination, the First Circuit Court of Appeals has taken into account the intent of the parties in assessing the enforceability of a liquidated damages provision and it is appropriate to do so here . . . [Plaintiff's] testimony reveals it was [his] intent to impose the liquidated damages provision to punish in the event of breach and it confirms that the liquidated damages clause is an unenforceable penalty." Nate and Alex were pleased to achieve a significant victory for the client and look forward to prevailing on the remaining claims at trial.

ARTICLES OF INTEREST

New Federal Law Prohibits Employers From Mandating Arbitration of Sexual Assault and Sexual Harassment Claims

By: [Laura Raisty](#)



On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("the Act"), which amends the Federal Arbitration Act to invalidate pre-dispute arbitration agreements and class or collective action waivers covering sexual assault and sexual harassment claims at the election of either: (1) the person alleging the misconduct or (2) the named representative of a class or in a collective action alleging such misconduct. The Act applies to all claims that arise or accrue after March 3, 2022, without regard to the date of the arbitration agreement. It does not, however, affect any claim that arose or accrued before March 3, 2022.

[Read More Here](#)

SJC Holds That Parties Cannot Contract Away Willful or Knowing Violations of the Massachusetts Consumer Protection Act, Chapter 93A



By: [Michael Dickman](#)

On January 24, 2022, the Supreme Judicial Court struck down a contractual limitation of liability provision as void against public policy. In *H1 Lincoln, Inc. v. South Washington Street, LLC*, the SJC held that contract waiver does not preclude multiple damages under the Massachusetts Consumer Protection Act (c. 93A) for willful or knowing misconduct.

[Read More Here](#)

The Policy Giveth and the Policy Taketh Away: Do You Know Your Insurance Policy's Coverage Exclusions?



By: [J. Nathan Cole](#)

If you own a construction business, a Commercial General Liability (CGL) policy is a crucial part of protecting your business from various losses. Generally, a CGL policy provides a business with insurance coverage for bodily injury and property damage caused by the business's operations, products, or injuries that occur on its premises.

[Read More Here](#)

FIRM HAPPENINGS

In February, [J. Nathan Cole](#) presented in Scottsdale, AZ at the International Association of Defense Counsel's 2022 Mid-Year Meeting. Nate and his fellow panelists presented on "Blockchain and the Practice of Law: How Cryptocurrency Will Impact The Legal Profession and Our Clients." They discussed the technology behind Bitcoin and how that technology (known as blockchain) will

soon transform the healthcare, insurance, entertainment, construction, medical and legal industries. Nate combined his experience with crypto and construction law to explain how he sees blockchain as being used in the near future to track "smart contracts," affect chain of custody issues, medical records in litigation, and allow for parties to instantly transfer funds and execute agreements without third-party authentication. K&S on the cutting edge!





Matt!

High-Profile Magazine has featured Matthew Welnicki as the newest Partner at Kenney & Sams. Matt joined us as a litigation Partner, focusing his practice on business litigation, construction law, and products and tort defense. He has extensive trial and courtroom experience and has handled matters before administrative agencies and arbitration panels. He also provides business advice and conducts investigations for clients on sensitive matters. Matt has a growing practice representing clientele ranging from large corporations and government agencies to start-up companies, small businesses, and individuals. Matt is known for finding simple and creative solutions to difficult problems. Welcome to the team,

Michelle De Oliveira has been busy providing the Firm's clients with hands-on sexual harassment and discrimination trainings. Michelle was herself trained through the Massachusetts Commission Against Discrimination on how to conduct trainings for employers. These sessions offer significant value and risk management opportunities to employers while providing employees and management teams with useful tools to raise awareness and knowledge of how to prevent harassment and discrimination in the workplace.



Michelle De Oliveira and Laura Raisty have been hard at work ensuring our clients are kept informed of all the most recent and important updates regarding COVID19 and vaccine mandates for employers. Please see list of recent articles below for your reference. Click to read more.

- [Massachusetts Adopts CDC's Newly Issued Guidance Relating To Isolation & Quarantine; Interplay with OSHA's ETS on January 12, 2022](#)
- [United States Supreme Court Halts Enforcement Of OSHA's ETS for Private Employers with 100+ Employees on January 14, 2022](#)
- [Massachusetts Ending COVID-19 Temporary Emergency Paid Sick Leave on March 15, 2022](#)

On March 15, 2022, K&S continued its ongoing webinar series with our second Employment Law Series webinar titled, Employers: 5 Steps To Best Arm Yourself In Advance To Defend Discrimination Lawsuits. If you did not catch it live, you can still catch Michelle De Oliveira and Laura Raisty as they discuss the steps that employers can (and should) take to reduce the risk for employment discrimination claims and to best position themselves to defend against such claims. [Watch here](#)

Speaking Engagements

Mike Sams moderated the Associated Builders and Contractors of Massachusetts Town Hall Forum on January 20, 2022 where they discussed the Update on Employer COVID Guidance. In this ABC Town Hall Forum, Mike was joined by Dr. Chris Cherubino, Medical Director from member firm ARCpoint Labs, and Matt Pappas, President of Arcpoint Labs Woburn, who discussed what they saw from the medical perspective in the post-holiday COVID surge and what services were available to ensure that your workforce stays safe and healthy.

On February 25, 2022, [Mike Dickman](#) moderated the [MassDLA Trial Practice](#) and Young Lawyer Division Remote Seminar. The lecture, geared to associates and anyone looking for a refresher, highlighted trial preparation strategies to make the most of your defense. More here: <https://lnkd.in/dHwGz77H>

[Emyr Remy](#) and [Mike Dickman](#) attended the U.S. District Court Roundtable for Young & Emerging Leaders of the Bar on March 10th. Selected by leaders of the MBA, this event was exclusively for attorneys that have been practicing for 10 years or less. During the program, Emyr and Mike met with a number of federal judges to analyze and discuss hypothetical scenarios often encountered by young lawyers.

On April 13, 2022, [J. Nathan Cole](#) will present on negotiating and drafting liquidated damages and how to ensure LD provisions are enforceable. He will be speaking to members of the Massachusetts Defense Lawyers Association.

On May 12, 2022, [Chris Kenney](#) will present on “How to ‘Win’ At Mediation” to members of the Massachusetts Defense Lawyers Association’s Young Lawyers Division. Chris will discuss how counsel can best present their cases at mediation, focusing on logistics, planning, and preparation.

WEBINARS



K&S continues to offer our clients substantive updates on key issues affecting the construction industry. Join us live at one of our upcoming webinars or if you missed any, you can view past webinars here: <https://kslegal.com/webinars/>

PREVIOUSLY RECORDED WEBINARS:

- **Mastering the Claims Process & No Damage for Delay Clauses**
by [Mike Sams](#) & [Drew Colby](#)
- **Refining GMP Contracts Including Contingency Clauses**
by [Mike Sams](#) & [Drew Colby](#)
- **Contract Termination Issues**
by [Drew Colby](#) & [Matthew Welnicki](#)

UPCOMING WEBINARS:

all webinars begin at 7:30am

April 21 - Mastering Prompt Pay Traps and Obligations

May 19 - Key Issues in Public Construction

In preparation for this next year’s webinar series, we are looking for input on topics. If you have any topic requests to be covered in 2022, please contact [Drew Colby](#) at

GET TO KNOW YOUR K&S TEAM MEMBER: LAURA RAISTY



Best advice you were ever given as a professional: When I was a young lawyer, one of my mentors advised me to treat everyone I encounter in a professional capacity with respect and courtesy. She certainly practiced what she preached and was always friendly, kind, and respectful to everyone she encountered in her practice – colleagues, opposing counsel, judges, court officers, court reporters, support staff, and delivery people. I pride myself on doing the same.

Favorite part about working for K&S: It is gratifying to work with a talented and hardworking team that has a breadth of experience in varied areas of the law. It is always valuable to sit down with a K&S colleague to brainstorm about how to achieve the best results for our clients.

Best non-legal job you've ever had: In college, I was a summer camp counselor and swimming instructor at Girl Scout camps in New Hampshire and on Cape Cod. My love of the outdoors and for sitting in the sun can be traced directly back to these jobs. I am also fortunate in that some of my very best friends are those I spent summers with on the shores of Lake Winnepesaukee and Long Pond. If I could take every summer off and return to camp, I would!

Something we may not know about you: I love Thai food so much that I took a two-week trip to Thailand in 2018/2019. I zip lined in Chiang Mai, kayaked on the River Kwai, bicycled in Ayutthaya, and rang in the New Year on the streets of Bangkok.

